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No.

IN THE

Supreme Court Of The United States

October Term, 1983

V.N.A. OF GREATER TIFT COUNTY, INC.,
Petitioner

v.

MARGARET HECKLER, Secretary of Health and Human Services and BLUE CROSS/ BLUE SHIELD OF GEORGIA/COLUMBUS, INC.,
Respondents

Petition for a Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit

JOE R. WHATLEY, JR.
JOHN C. FALKENBERRY
STEWART, FALKENBERRY & WHATLEY
Suite 305, 2100 16th Avenue South
Birmingham, Alabama 35205
(205) 933-0300

QUESTIONS PRESENTED

(1) Did the Court of Appeals err by deciding that when a dispute arises out of the Medicare program, Courts should depart from the traditionally accepted standards for granting a preliminary injunction based on the All Writs Act, 28 U.S.C. § 1651?

(2) Did the Court of Appeals err by requiring proof of "(1) a virtual certainty of irreparable injury, [and] (2) a similar certainty of success on the merits . . .," before a preliminary injunction under the All Writs Act may be granted?

(3) Did the Court of Appeals err by ruling that being forced out of business and into bankruptcy does not constitute irreparable harm sufficient to support the issuance of a preliminary injunction under the All Writs Act?

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No.

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V.N.A. OF GREATER TIFT COUNTY, INC.,[1]
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v.

MARGARET HECKLER, Secretary of Health and Human Services and BLUE CROSS/ BLUE SHIELD OF GEORGIA/COLUMBUS, INC.,
Respondents

Petition for a Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit reported at 711 F.2d 1020 (11th Cir. 1983) and is reprinted at App. 1-37 (pages 1-37 of the Appendix to this petition). The Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc without opinion. App. 38. The District Court did

[1]The caption of this case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

not enter an opinion; its Order dismissing the complaint is not reported but is reprinted at App. 40-41.

JURISDICTION

On August 12, 1983, the United States Court of Appeals for the Eleventh Circuit, with Chief Judge Godbold dissenting, App. 33, affirmed the District Court's order denying Petitioner's request for a preliminary injunction and dismissing Petitioner's complaint. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on October 7, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

Petitioner is a small home health care agency serving almost exclusively home-bound Medicare beneficiaries in several rural counties in South Georgia. Petitioner is a nonprofit corporation deriving virtually all of its income from reimbursement by the Medicare program, which reimburses Petitioner only for its actual, reasonable costs incurred in serving Medicare beneficiaries. Thus, Petitioner has neither profits nor accrued earnings. At all times material to this action, Petitioner has kept its costs within the limits set by the Medicare program.

Respondent Margaret Heckler, Secretary of Health and Human Services, is responsible for administration of the Medicare program. Under the Medicare reimbursement scheme, providers of home health care services receive periodic payments through fiscal intermediaries such as Respondent Blue Cross/Blue Shield of Georgia/Columbus, Inc., which act as agents of the Secretary in administering the Medicare program. During each year, Petitioner has received periodic interim payments from Respondents for

providing services to beneficiaries of the Medicare program. The amount of these periodic interim payments is determined based on reports which Petitioner submits to Respondents at least quarterly. At the end of each year, each provider of services to Medicare beneficiaries submits an annual cost report which the fiscal intermediary first audits and then makes retroactive adjustments in Medicare reimbursement.

For several years after being formed Petitioner had a management contract with Health Care International, Inc. (hereinafter "HCI"). On September 5, 1980, Petitioner chose to terminate the management contract. Nevertheless, Respondents determined that during 1980 HCI and Petitioner were related organizations within the meaning of 42 C.F.R. § 405.427 and that, therefore, certain expenses which Petitioner had incurred with HCI would be disallowed.

On June 9, 1982 Petitioner received notice of retroactive disallowances for the year 1980, totaling $31,637.00. The notice also stated that the disallowed amount was subject to immediate collection efforts effective June 28, 1982.

After receiving the notice described above, Petitioner filed its complaint in the United States District Court for the Middle District of Georgia, requesting a preliminary injunction prohibiting the collection efforts described above pending final disposition of Petitioner's administrative remedies. After a hearing, the District Court denied the preliminary injunction and dismissed the complaint for lack of subject-matter jurisdiction.

Petitioner took a timely appeal to the United States Court of Appeals for the Eleventh Circuit. The appeal in this case was consolidated with another appeal from the United States District Court for the Northern District of Alabama in *Alabama Home Health Care v. Schweiker*, 527

F.Supp. 849 (N.D. Ala. 1981), appeal dismissed as moot, 711 F.2d 988 (11th Cir. 1983), in which the District Court had determined that there was subject-matter jurisdiction and had issued a preliminary injunction similar to that requested by Petitioner. The Court of Appeals, with Chief Judge Godbold dissenting, held that the District Court had erred in determining that it lacked subject matter jurisdiction but nonetheless affirmed the denial of preliminary injunctive relief, finding that Petitioner had not adduced proof which satisfied the "heightened standards" which the Court of Appeals applied to this case. These heightened standards, which will be discussed more fully below, depart from the traditionally accepted standards of showing by a "substantial likelihood" in order to obtain a preliminary injunction and instead require Petitioner to prove to a "virtual certainty" that it would prevail in the administrative proceeding and that without the requested relief it would suffer irreparable harm.

Petitioner has alleged, and the Court of Appeals has accepted as true, that immediate collection of these disallowances would have the effect of forcing Petitioner out of business and into bankruptcy before it ever had the opportunity to avail itself of the administrative and judicial reviews under 42 U.S.C. § 1395oo. Even if the Medicare program allowed a thirty-six month repayment schedule, the longest such repayment schedule which it provides, immediate collection efforts would bankrupt Petitioner and also would deprive many, if not all, Medicare beneficiaries served by Petitioner of the home health services which have been authorized for them by Congress.

Under the applicable regulations, organizations are related only if there is "significant" common ownership or "significant" common control. 42 C.F.R. § 405.427. Since Petitioner is a non-profit corporation and has no ownership,

there can be no common ownership. At no times have there been common directors, officers or employees between Petitioner and HCI. None of the Petitioner's officers or directors has received any salary or remuneration from HCI. An absence of common control is evidenced by the fact that in 1980 Petitioner terminated its management contract with HCI.

REASONS FOR GRANTING THE WRIT

I. The Issue Presented In This Case Is of Extreme Importance To All Home Health Agencies, In That It Will Determine Whether The Small Businesses Providing Home Health Services Will Be Allowed To Survive While They Exercise Their Right To Administrative and Judicial Review of Arbitrary Actions By Fiscal Intermediaries.

The ultimate issue in this case is whether a fiscal intermediary under the Medicare Act should be allowed unilaterally to force a Medicare provider out of business and into bankruptcy, before the provider has any opportunity to obtain the administrative or judicial review Congress has provided, even where the provider shows that there is a substantial likelihood that it will prevail in the administrative or judicial proceedings. This issue is of such importance that the American Federation of Home Health Agencies, a national association of home health agencies, chose to provide funds for this petition when Petitioner could not afford to do so.

The issues presented in this case are significantly related to those in No. 83-56 *Heckler v. Community Health Services of Crawford County, Inc.*, 698 F.2d 615 (3d Cir. 1983), *cert. granted* 52 U.S.L.W. 3262 (October 3, 1983). In that case, as in this one, plaintiff was attempting to obtain injunctive relief against damaging recoupment efforts by an intermediary. As will be discussed more fully, only

by approving the remedy sought by Petitioner can this Court ameliorate the kind of "egregious . . . affirmative misconduct of the government's agent . . .", 698 F.2d at 617, which cases such as this case challenge.

Under the "heightened standards" which the Court of Appeals applied to Medicare reimbursement disputes, a provider must prove to a virtual certainty irreparable harm and the likelihood of prevailing in the administrative proceedings before a District Court may issue a preliminary injunction under the All Writs Act, 28 U.S.C. § 1651, to maintain the *status quo* while the administrative proceeding is pending. App. at 30. The Court of Appeals held that a showing that a provider is being forced out of business and into bankruptcy is not sufficient to satisfy the requirement of irreparable harm under Rule 65, FRCP. As Chief Judge Godbold discussed in his dissent, such a ruling renders meaningless the administrative and judicial review provided by Congress in 42 U.S.C. § 1395oo.

Because actions such as this must be filed and litigated expeditiously, the heightened standards requirement places an impossible burden on a provider attempting to forestall collection efforts pending resolution of its appeals under the statute. The provider simply does not have the time to develop and present proof which satisfies such a heavy burden.

II. Not Only The Courts of Appeal, But Also The Judges On The Eleventh Circuit, Are Divided On The Questions Presented In This Case.

This Court has recently recognized that two reasons for granting certiorari are (1) a division among the judges of a Circuit and (2) a division among Circuits in resolving the issue in question. *Russello v. United States*, 52 U.S.L.W. 4003, 4004 (November 1, 1983). Both reasons are present in this case.

First, the judges of the Eleventh Circuit are divided in this case. The Chief Judge dissented with a well reasoned opinion, which this Court should adopt. The author of the opinion for the Court of Appeals is Judge Smith, a member of the Federal Circuit. Only one other judge on the Eleventh Circuit, Judge Fay, joined in the opinion.

Second, the Circuits are divided on the basic legal issues involved in this case. The decision of the Court of Appeals for the Eleventh Circuit is an attempt to balance a federal district court's authority under the All Writs Act, 28 U.S.C. § 1651, against the jurisdictional limitations contained in 42 U.S.C. § 405 (h).

Since this Court's decisions in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), "the scope of the preclusion provision [§ 405 (h)] has engendered much litigation and little consensus." App. at 12. Several Circuits have held that challenges under the Administrative Procedure Act are not precluded by § 405 (h). *Daniel Freeman Memorial Hospital v. Schweiker*, 656 F.2d 473, 476 (9th Cir. 1981); *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1080 (D.C. Cir. 1978); *St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283, 292 (8th Cir.), *cert. denied*, 429 U.S. 977 (1976). At least three Circuits have ruled that when the Provider Reimbursement Review Board ("PRRB"), the administrative agency created under § 1395oo, cannot hear an issue, a District Court's jurisdiction is not precluded by § 405 (h). *National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 940-41 (D.C. Cir. 1982); *Chelsea Community Hospital v. Michigan Blue Cross Association*, 630 F.2d 1131, 1134-35 (6th Cir. 1980); *United States v. Aquavella*, 615 F.2d 12, 20-21 (2d Cir. 1980); *Whitecliff, Inc. v. United States*, 536 F.2d 347, 350-51 (Ct. Cl. 1976), *cert. denied*, 430 U.S. 969 (1977). Other Courts seem to

have held that a District Court is totally precluded from review until there is a decision by the PRRB. E.g., *Hadley Memorial Hospital, Inc. v. Schweiker*, 689 F.2d 905 (10th Cir. 1982); *Rhode Island Hospital v. Califano*, 585 F.2d 1153 (1st Cir. 1978); *Dr. John T. MacDonald Foundation, Inc. v. Califano*, 571 F.2d 328 (5th Cir. en banc), *cert. denied*, 439 U.S. 893 (1978). The Seventh Circuit has ruled that the Court of Claims has jurisdiction over constitutional claims, *Trinity Memorial Hospital of Cudahy, Inc. v. Associated Hospital Services, Inc.*, 570 F.2d 660, 666-67 (7th Cir. 1977), while the Eighth Circuit has ruled that § 405 (h) does not preclude a District Court from considering procedural constitutional claims. *St. Louis University*, 537 F.2d at 288-89. Now, the Eleventh Circuit has issued an opinion, different from any other Circuit, holding that a District Court has jurisdiction to consider the claims presented by Petitioner but that special or heightened standards apply to such claims.

In summary, the law in this area is quite confused, and Circuits differ in their application of a federal statute in numerous ways. This is a situation which begs this Court to exercise its authority to clarify the law.

III. The Court of Appeals Misconstrued This Court's Interpretation of The All Writs Act.

The All Writs Act, 28 U.S.C. § 1651, authorizes a Court to protect or preserve its jurisdiction. In *Federal Trade Commission v. Dean Foods Company*, 384 U.S. 597, 604 (1966) this Court ruled that the All Writs Act "includes the traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in process and prevent *impairment* of the effective exercise of appellant jurisdiction." Emp. Supp. In this case, Petitioner has attempted to preserve the *status quo* and continue to oper-

ate while it obtains administrative review, presenting almost precisely the issue involved in *Dean Foods*. The Eleventh Circuit ruled, however, that *Sampson v. Murray*, 415 U.S. 61 (1974), modified the ruling in *Dean Foods*. The Court of Appeals stated that since "*Murray* used the term 'defeat' to describe the required effect on the Court's jurisdiction," the heightened standards for issuing a preliminary injunction under the All Writs Act were adopted. However, the Court of Appeals failed to mention that subsequent to *Murray*, this Court returned to the standard of *Dean Foods*:

> The Court has also held that despite the absence of expressed statutory authority to do so, the Federal Trade Commission may petition for, and a Court of Appeals may issue, pursuant to § 1651, an order preventing a merger pending hearings before the Commission to avoid *impairing* or *frustrating* the Court of Appeals' appellant jurisdiction. *F.T.C. v. Dean Foods Company*, 384 U.S. 597 (1966).

United States v. New York Telephone Company, 434 U.S. 159, 173 (1977) (Emp. Supp.). In light of this more recent pronouncement, it must be concluded that the use of the term "defeat" in *Murray* "was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty . . .", *Texas v. Brown*, 103 S.Ct. 1535, 1542 (1983), is required for the application of the All Writs Act.

IV. The Heightened Standards Requirement Exacerbates The Problem Which The Court of Appeals Sought To Address, Causing District Courts To Become More Involved In Determining The Question To Be Presented To The Administrative Agency Than If It Were Applying The Traditional Standard For Issuing A Preliminary Injunction.

In this case Petitioner has not asked the District Court to decide the reimbursement dispute which will be presented to the PRRB. Instead, it is asking the District Court to preserve the *status quo* until the PRRB has the opportunity to consider and decide the reimbursement dispute.

Nevertheless, the Court of Appeals considered that this case involves two competing interests which are central to administrative law: (1) on the one hand, Courts should protect affected parties to allow them to have meaningful review of Governmental actions; and (2) on the other hand, Courts should not prejudge the merits of a dispute so as to infringe upon the administrative body responsible for determining the disputed issues in the first instance. However, even assuming that this consideration were relevant, the Court of Appeals reached an incorrect balance of these competing interests.

In *Alabama Home Health Care, Inc. v. Schweiker*, 527 F.Supp. 849 (N.D. Ala. 1981), dismissed as moot, 711 F.2d 988 (11th Cir. 1983), the District Court issued an injunction, based on the All Writs Act, preserving the *status quo* to protect its potential jurisdiction under 42 U.S.C. § 1395oo to review the decision of the PRRB. The District Court correctly determined that without the requested relief, the provider would be forced out of business and into bankruptcy, and granted preliminary relief based on traditionally accepted equitable principles, i.e., the "substantial likelihood" standard.

As with most historical developments in the law, there are good and practical reasons why the substantial likelihood standard, rather than the virtual certainty standard, has been applied in cases where preliminary injunctions are sought. Temporary restraining orders and preliminary injunctions, by their very nature, involve emergency or expedited litigation. There is little time for orderly discovery during which a party can develop evidence to meet its burden of proof. As Chief Judge Godbold correctly stated in his dissenting opinion, the heightened standards adopted by the majority opinion require providers to conduct immediate and extensive discovery – most likely through expensive depositions – to establish the proof necessary to prevail. Undoubtedly, such discovery will be more disruptive than was the proceeding in *Alabama Home Health Care*.

Furthermore, since this case involves the federal government and its agents, the doctrine of sovereign immunity eliminates or limits such remedies to abuse as lawsuits for damages. Congress has recognized that arbitrary bureaucratic action continues to be a problem, particularly for small businesses like Petitioner which lack the resources to become involved in protracted litigation. See, e.g., House Report No. 96-1418 at 5, 1980 U.S. Code Cong. & Admin. News 4984. Because of the sovereign immunity defense, actions for injunctive relief are a more important remedy in the public sector than in the private sector where damages are available to a plaintiff.

The presumption in our system of government is in favor of judicial review and opposed to "administrative absolutism." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 157 (1970). The "preclusion of judicial review of administrative action . . . is not lightly to be inferred." *Barlow v. Collins*, 397 U.S. 159, 166

(1970). Accord, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). The reason for the presumption in favor of judicial review is apparent:

> [T]he availability of judicial review is by far the most significant safeguard against administrative excesses which can be contrived. . . . [A]n important source of the efficacy of judicial review is its preventive value. . . . [T]he possibility of judicial reexamination leads to a closer attention of the facts, to the reasons given, and to the statutory words which are used to support the agency's action.

W. W. Gardner, The Administrative Process in *Legal Institutions Today and Tomorrow* 108, 138-39 (M. G. Paulsen ed. 1959), quoted in Gellhorn and C. Byse, *Administrative Law* 144 (1974). The heightened standards adopted by the Court of Appeals are insufficient to curb such administrative excesses.

V. To Provide Petitioner With A Meaningful Remedy With Less Infringement Upon The Administrative Procedure This Court Should Require Petitioner To Show That It Has Exhausted All Administrative Means of Avoiding Irreparable Harm Rather Than Adopting The Heightened Standards.

In applying the heightened standards, the Court of Appeals ironically touched upon a more reasonable alternative to those heightened standards. That Court mentioned that the Secretary or the intermediary may enter into a repayment plan, to allow a provider to repay disallowances over a period of time. 42 C.F.R. § 405.371 *et seq.* App. at 30. As an alternative to requiring a showing under the heightened standards test, this Court should require a provider to prove that it has exhausted all available administrative forms of relief in an attempt to avoid irreparable harm as a condition precedent to the granting of the kind of pre-

liminary injunction requested in this case. Such a condition precedent would encourage both the provider to resolve its problems administratively and the Government to develop meaningful administrative remedies to cure the problems presented in this case.

It would be naive to assume, as has the Court of Appeals, that an intermediary would always offer a provider a reasonable repayment plan during administrative review. Too many officials within intermediaries may have "axes to grind" against providers of services to Medicare beneficiaries. Indeed, Courts have found intermediaries guilty of "egregious . . . affirmative misconduct . . ." in their treatment of providers. *Community Health Services, supra* at 617. The Court should note that the Court of Appeals has incorrectly stated that a plan under 42 C.F.R. § 405.373 (a) (2) was entered into between Alabama Home Health Care and its intermediary. In fact, the intermediary unilaterally decided to make reductions in payments to Alabama Home Health Care, an action which the District Court determined would force the provider out of business and into bankruptcy. 527 F.Supp., at 855, 858. Also, in this case, V.N.A. communicated with the Government about repayment before filing this suit, but V.N.A. could not obtain a repayment plan which would avoid irreparable harm.

Other effective alternatives in addition to exhausting available administrative remedies could be explored through supplemental briefs and argument. However, there must be a better alternative than saying, as has the Court of Appeals, that being forced into bankruptcy is not necessarily irreparable harm because the trustee in bankruptcy can still present the provider's claim.

CONCLUSION

For the reasons stated herein, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JOE R. WHATLEY, JR.
JOHN C. FALKENBERRY
STEWART, FALKENBERRY & WHATLEY
Suite 305, 2100 16th Avenue South
Birmingham, Alabama 35205
(205) 933-0300

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Petition for a Writ of Certiorari has been served on F. Richard Waitsman, Esquire, Gregory J. Leonard, Esquire and the Solicitor General by depositing same in the U. S. Mail, postage prepaid, on this 2nd day of December, 1983.

JOE R. WHATLEY, JR.

APPENDIX

V.N.A. OF GREATER TIFT COUNTY, INC.,
a Georgia non-profit corporation, Plaintiff-Appellant,

v.

Margaret M. HECKLER* and Blue Cross and Blue Shield of Georgia/Columbus, Inc., Defendants-Appellees.

No. 82-8407.

United States Court of Appeals, Eleventh Circuit.

Aug. 12, 1983.

Appeal was taken from a judgment of the United States District Court for the Middle District of Georgia, J. Robert Elliott, J., dismissing, for lack of jurisdiction, complaint by provider of medical services to obtain injunction to restrain collection action on alleged overpayment pending final administrative review. The Court of Appeals, Edward S. Smith, Circuit Judge, sitting by designation, held that: (1) All Writs Act empowers a district court, notwithstanding preclusion of jurisdiction provision in Medicare Act, to enjoin Secretary's suspension of reimbursement payments to medicare provider before exhaustion of administrative remedies, but (2) under heightened standards for preliminary injunction, pursuant to United States Supreme Court decision in *Sampson v. Murray*, provider was not entitled to such an injunction.

Affirmed.

Godbold, Chief Judge, dissented and filed opinion.

1. Federal Courts

All Writs Act may be basis for authority to issue an in-

*Pursuant to Rule 43, Fed.R.App.P., Richard S. Schweiker has been replaced as a defendant-appellee by Margaret M. Heckler who assumed office as Secretary of Health and Human Services on March 9, 1983.

junction, but it is not a basis of jurisdiction. 28 U.S.C.A. § 1651.

2. Social Security and Public Welfare

Under section of Medicare Act removing jurisdiction from courts to review reimbursement decision before Provider Reimbursement Review Board decision has been rendered, Secretary of Health and Human Services may well decide that full administrative review is completely futile, but a claim must be presented to Secretary for her to make this decision; a court may not substitute its judgment of futility because it has no jurisdiction until Secretary has made some decision. Social Security Act, § 205 (h), as amended, 42 U.S.C.A. § 405 (h).

3. Social Security and Public Welfare

Central target of Medicare Act provision removing jurisdiction from courts to review reimbursement decision before Provider Reimbursement Review Board decision has been rendered is any action envisioning recovery on any claim emanating from Medicare Act; regardless of its setting, any suit seeking eventual realization of provider-cost reimbursement under Medicare Act is intercepted by that section. Social Security Act, § 205 (h), as amended, 42 U.S.C.A. § 405 (h).

4. Administrative Law and Procedure

All Writs Act encompasses traditional power of courts to enter stay of enforcement of agency decision already entered, pending review in court issuing injunction, to prevent irreparable injury resulting from premature enforcement of agency decision. 28 U.S.C.A. § 1651.

5. Administrative Law and Procedure

While power under All Writs Act to enter stay of enforcement of agency decision already entered must not be used to circumvent agency decision making, there is a limited judicial power to preserve court's jurisdiction or maintain status quo by injunction pending review of any agency action through prescribed statutory channels. 28 U.S.C.A. § 1651.

6. Social Security and Public Welfare

All Writs Act empowers district court, notwithstanding preclusion of jurisdiction provision in Medicare Act, to enjoin suspension by Secretary of Health and Human Services of reimbursement payments to medicare provider before provider has exhausted administrative remedies required by Act to precede judicial review. Social Security Act, § 205 (h), as amended, 42 U.S.C.A. § 405 (h); 28 U.S.C.A. § 1651.

7. Administrative Law and Procedure

Proper analysis, in determining whether district court should exercise power to maintain status quo by injunction pending review of agency's action, is to subject to higher standards all requirements for preliminary injunction. 28 U.S.C.A. § 1651.

8. Social Security and Public Welfare

Medicare provider's motion for injunction to restrain collection action on alleged overpayment, pending filing of administrative review, was subject to higher standards pursuant to United States Supreme Court decision in *Sampson v. Murray*, even granting strong possibility of harm to reviewing court's eventual jurisdiction, because lengthy re-

view of merits required was so at odds with statutory framework that conflict was created. Social Security Act, §§ 201 et seq., 205 (h), as amended, 42 U.S.C.A. §§ 401 et seq., 405 (h); 28 U.S.C.A. § 1651.

9. Social Security and Public Welfare

In view of Medicare Act section removing jurisdiction from courts to review reimbursement decision before entering of Provider Reimbursement Review Board decision, heightened standards for deciding whether to grant, pursuant to United States Supreme Court decision in *Sampson v. Murray*, preliminary injunction to provider to restrain collection action on alleged overpayment pending final administrative review, required a virtual certainty of irreparable injury, a similar certainty of success on the merits, for example, outrageous or entirely unauthorized agency action, minimal harm to agency, in sense of disruption of its processes, and public interest clearly favoring assumption of jurisdiction. Social Security Act, §§ 201 et seq., 205 (h), as amended, 42 U.S.C.A. §§ 401 et seq., 405 (h); 28 U.S.C.A. § 1651.

10. Social Security and Public Welfare

Under heightened standards for granting of preliminary injunction, pursuant to United States Supreme Court decision in *Sampson v. Murray*, medicare provider was not entitled to preliminary injunction to restrain collection action on alleged overpayment pending final administrative review; among other things, provider did not make showing of irreparable injury sufficient in kind and degree to override Medicare Act's statutory preclusion cutting against general availability of preliminary injunctions to providers, and could not show probability of success on merits even approaching certainty required in light of that statutory

preclusion. Social Security Act, §§ 201 et seq., 205 (h), as amended, 42 U.S.C.A. §§ 401 et seq., 405 (h); 28 U.S.C.A. § 1651.

Appeals from the United States District Court for the Middle District of Georgia.

Before GODBOLD, Chief Judge, FAY and SMITH**, Circuit Judges.

EDWARD S. SMITH, Circuit Judge:

This appeal presents the efforts of a provider of medical services under the Medicare Act to obtain an injunction to restrain collection action on an alleged overpayment pending final administrative review. This appeal originally included a second case, *Alabama Home Health Care v. Heckler*, which presented the same legal issue on appeal but which has been dismissed as moot.[1] The district court in the Alabama Home Health Care case granted the requested injunction,[2] but the district court in this case dismissed the complaint for lack of jurisdiction.[3] On appeal, we must decide whether the All Writs Act empowers a district court, notwithstanding the preclusion of jurisdiction provision in the Medicare Act, 42 U.S.C.A. § 405 (h), to enjoin the Secretary's suspension of reimbursement payments to a Medicare provider, before the provider has exhausted the administrative remedies required by the act to precede judicial

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**Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

[1] *Alabama Home Health Care, Inc. v. Heckler*, slip op. p. _____, _____ F.2d _____ No. 82-7042 (11th Cir. August 8, 1983). Although *Alabama Home Health Care* has been dismissed as moot, we will allude occasionally to it to illustrate points pertinent to the present case.

[2] *Alabama Home Health Care, Inc. v. Schweiker*, 527 F.Supp 849 (N.D. Ala. 1981).

[3] *V.N.A. of Greater Tift County, Inc. v. Schweiker*, Civ. No. 82-106-COL (M.D. Ga. June 28, 1982).

review. We hold that the district court has the power to issue an injunction in certain extraordinary circumstances but that those circumstances are not presented in this case.

I.

A.

Under the Medicare program the Secretary of Health and Human Services (Secretary) reimburses providers of health services for certain medical items and services supplied to persons enrolled in the program.[4] Medicare coverage includes items and services supplied on a visiting basis to an eligible person's home. 42 U.S.C. § 1395x(m) (1976 & Supp. IV 1980). V.N.A. of Greater Tift County, Inc. (V.N.A.) provides these home health care services. It is a nonprofit corporation that derives virtually all of its income from reimbursement by the Medicare program. Possessing neither large cash reserves nor alternative sources of income, V.N.A. is largely dependent upon frequent reimbursement of all expenses in order to remain solvent.

Reimbursement of a provider by the Secretary is accomplished through a "fiscal intermediary," either a public or a private organization, which makes the initial determination of amount of reimbursement and handles the payments. 42 U.S.C. §§ 1395g, 1395h. V.N.A.'s intermediary was Blue Cross and Blue Shield of Georgia/Columbus, Inc. (Blue Cross).

To facilitate participation in the Medicare program by cash-poor providers like V.N.A., Congress has authorized a system of monthly interim payments by the intermediary.

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[4]The Medicare program was created by the Medicare Act, 42 U.S.C. §§ 1395-1395vv (1976 & Supp. IV 1980), as a medical and hospital insurance program for persons otherwise eligible for the benefits provided by the Social Security Act, 42 U.S.C. §§ 301-1397f. All section references will be to the U.S. Code.

42 U.S.C. § 1395g; 42 C.F.R. § 405.454 (1981). The interim payments are computed from interim rates which are established and adjusted quarterly and annually by the intermediary on the basis of quarterly and annual cost reports filed by the provider. 42 C.F.R. § 405.454. No reimbursement may be made unless the provider has supplied these reports and, on request, has provided all the information necessary to substantiate them. 42 U.S.C. § 1395g(a); 42 C.F.R. § 405.406. The provider, in other words, has the burden of substantiation. 42 C.F.R. § 405.453(a); *Gosman v. United States*, 573 F.2d 31, 36 n. 4, 215 Ct.Cl. 617 (Ct.Cl. 1978).

Upon receipt of the cost report, the intermediary analyzes the report, audits it if necessary, and issues its determination of the proper amount that the provider should have been reimbursed during the period covered by the report. 42 C.F.R. § 405.1803(a). A provider who is dissatisfied with the intermediary's determination, and whose claim exceeds $10,000, has the right to review by the Provider Reimbursement Review Board (PRRB). 42 U.S.C. § 1395*oo*; 42 C.F.R. § 405.1835. The PRRB is the final administrative remedy available to a provider (unless the Secretary on his own motion reviews the PRRB) and judicial review is based on its determination. 42 U.S.C. § 1395*oo*(f).

The intermediary's determination that an overpayment has occurred provides the basis for immediate suspension of all or part of further payments to the provider. 42 C.F.R. § 405.1803(b). This suspension must be imposed by the intermediary and the suspension must continue until the overpayment is liquidated or an agreement is reached, notwithstanding any administrative appeal taken by the provider. 42 C.F.R. §§ 405.1803(b), 405.373(a). The PRRB has no power to stay the suspension while the case is pend-

ing before it; it can only end the suspension by overturning the intermediary's determination on the merits. 42 C.F.R. §§ 405.1869, 405.373 (a) (3); *see generally* 42 C.F.R. §§ 405.1835-405.1875.

B.

Among the rules that the intermediary must apply in making its determination of amount of reimbursement is the related party principle. 42 C.F.R. § 405.427. Where a provider obtains services, facilities, or supplies from a related organization, it will be reimbursed only for the cost to that supplier or for the market price, whichever is lower. 42 C.F.R. § 405.427 (c) (2). Two organizations are related when they are "to a significant extent * * associated or affiliated," when one owns or controls the other, or when they have common ownership or control. 42 C.F.R. § 405.427 (b).

A provider may obtain an exception to this rule if it "demonstrates by convincing evidence to the satisfaction of the fiscal intermediary" that the supplier is "a bona fide separate organization," that the supplier has a significant amount of business with unrelated organizations and operates in a competitive market, that the supplies are of a type normally obtained by a provider from a separate supplier, *and* that the supplier's prices are "in line with" the prices on the open market. 42 C.F.R. § 405.427 (d).

In this case, the intermediary, Blue Cross, determined that a Medicare overpayment had occurred, $19,026 of which constituted overcharging by V.N.A.'s management firm, Health Care International, Inc. (HCI). Blue Cross found that HCI and V.N.A. were related because HCI had "effective control" over V.N.A.; accordingly, Blue Cross discounted the payments by V.N.A. to HCI. In its statement of reasons for its findings, Blue Cross noted that HCI

had started up and capitalized V.N.A. and had recruited V.N.A.'s board of directors. The board had little involvement in the running of V.N.A.; HCI had almost entire administrative and financial control. The head administrator of V.N.A. was an HCI employee. HCI set all policies and provided professional training and guidance; it had sole control over all personnel – policies and individual actions – and custody of V.N.A.'s financial and statistical records. HCI had the authority to enter into contracts for V.N.A. and could enter transactions for up to $2,500 without board approval. This authority was exercised on some occasions to enter supply contracts with companies owned or partly owned by HCI.

V.N.A. does not contest these points but rather stresses that V.N.A. and HCI were formally separate organizations. V.N.A. has no stock, so there is no common ownership; there are no common directors, officers, or employees; and no one from HCI is on the V.N.A. Board of Advisors. V.N.A. demonstrates the independence of its board of directors by pointing out that it terminated its management contract with HCI. V.N.A.'s ultimate claim – that HCI's charges were not unacceptably high – is somewhat undercut, however, by its statement in terminating HCI that HCI's charges were "far out of line."

V.N.A. argued in its timely appeal to the PRRB that the Blue Cross determination of relatedness was erroneous.

II.

At the same time that it filed for review by the PRRB, V.N.A. filed suit in district court to enjoin the suspension of payments pending a PRRB decision. V.N.A. claimed that, as virtually all of its patients are in the Medicare program, the incorrect suspension of full payments will cause it irreparable harm. The Secretary objected that the dis-

trict court was without jurisdiction to review the intermediary's decision before a PRRB decision had been rendered.

[1] Judicial review of reimbursement determinations is limited by the Medicare Act. Not only does the act require that a provider exhaust its administrative remedies before suing, but it *removes jurisdiction* from the courts to review a reimbursement decision before a PRRB decision has been rendered. The Medicare Act, 42 U.S.C. § 1395ii, incorporates the preclusion provision in the Social Security Act, which reads in pertinent part:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 [general federal question] or 1346 [United States as defendant] of title 28 to recover on any claim arising under this subchapter.

42 U.S.C. § 405(h) (1976).[5] This limits a provider to review through the procedure provided by the Medicare Act:

> A decision of the Board shall be final unless the Secretary, on his own motion, and within 60 days after the provider of services is notified of the Board's decision, reverses, affirms, or modifies the Board's decision. Providers shall have the right to obtain judicial review of any final decision of the Board, or of any reversal, affirmance, or modification by the Secretary, by a civil

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[5]There can be no question that § 405(h) fully applies to the present case, because the district court's jurisdiction is founded on 28 U.S.C. § 1331. The All Writs Act may be the basis for authority to issue an injunction, but it is not a basis of jurisdiction. "It is settled that • • • the All Writs Act, by itself, creates no jurisdiction in the district courts. It empowers them only to issue writs in aid of jurisdiction • • • acquired on some other independent ground." *Brittingham v. Commissioner*, 451 F.2d 315, 317 (5th Cir. 1971); *see also Epps v. Bexar-Medina-Atascosa Counties Water Improvement Dist. No. 1*, 665 F.2d 594, 595 (5th Cir. 1982).

> action commenced within 60 days of the date on which notice of any final decision by the Board or of any reversal, affirmance, or modification by the Secretary is received. * * * Such action shall be brought in the district court of the United States for the judicial district in which the provider is located or in the District Court for the District of Columbia and shall be tried pursuant to the applicable provisions under chapter 7 of title 5 [the Administrative Procedure Act] * * *

42 U.S.C. § 1395*oo* (f) (1) (Supp. IV 1980).

[2] In *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), and *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Supreme Court held that the limitation of jurisdiction is to be strictly applied.[6] The preclusion provision is not merely "a codification of the doctrine of exhaustion of administrative remedies," which a court could waive if exhaustion appeared futile, but "prevent[s] review of decisions of the Secretary save as provided in the Act, which provision is made in [§ 1395oo (f)]."[7] *Salfi*, 422 U.S. at 757, 95 S.Ct. at 2463. *Mathews v. Eldridge* explained that under *Salfi* a provider is faced with (1) an unwaivable (because jurisdictional) requirement that the provider present a claim to the Secretary (*i.e.*, to the PRRB) for a decision and (2) a waivable

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[6] *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), and *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), interpreted the Social Security Act. The Medicare Act incorporates the Social Security Act preclusion provision, 42 U.S.C. § 405 (h), which "shall * * * apply with respect to [the Medicare Act] to the same extent as [it is] applicable with respect to [the Social Security Act]." 42 U.S.C. § 1395ii. Therefore, *Salfi* and *Eldridge* are controlling. *Dr. John T. MacDonald Foundation, Inc. v. Califano*, 571 F.2d 328, 331 (5th Cir.) (en banc), *cert. denied*, 439 U.S. 893, 99 S.Ct. 250, L.Ed.2d 238 (1978).

[7] *Salfi* discussed the Social Security judicial review provision, § 405 (g). The Medicare Act provision, § 1395oo (f), is the "functional equivalent of § 405 (g) in this context expressly authorizing judicial review of final decisions of the [PRRB], and of any reversal, affirmance or modification of any Board decision by the Secretary." *Rhode Island Hosp. v. Califano*, 585 F.2d 1153, 1158 (1st Cir. 1978).

requirement of the *full* proceeding set out by statute and regulation.[8] *Eldridge*, 424 U.S. at 328-32, 96 S.Ct. at 899-901. In other words, the Secretary may well decide that full administrative review is completely futile, but a claim must be presented to the Secretary for her to make this decision. A court may not substitute its judgment of futility because it has no jurisdiction until the Secretary has made some decision. *Salfi*, 422 U.S. at 766, 95 S.Ct. at 2467.

[3] Since *Salfi* and *Eldridge*, the scope of the preclusion provision has engendered much litigation and little consensus. It is agreed by all of the circuits that the central target of the section 405 (h) preclusion is "any action envisioning recovery on any claim emanating from" the Medicare Act. *Association of American Medical Colleges v. Califano*, 569 F.2d 101, 107 (D.C. Cir. 1977). Regardless of its setting, any suit "seeking eventual realization of provider-cost reimbursement under the Medicare Act" is "intercept[ed]" by section 405 (h). *Id.* From this point on, however, consensus ceases. To summarize: some circuits have held that section 405 (h) does not preclude challenges brought under the Administrative Procedure Act — not because the APA provides an independent source of jurisdiction,[9] but because a claim "brought simply to vindicate an interest in procedural regularity" is not an action "*to recover* on any claim." *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1080 (D.C. Cir. 1978) (emphasis

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[8]For example, *Salfi* involved a constitutional challenge to Social Security regulations. While it might ordinarily have been clear that exhaustion would be futile — the Secretary would be unlikely to declare his own regulations unconstitutional — it was not for the court to determine futility. Having found that Salfi had already presented her claim to the Secretary, the Court held that the *Secretary* had waived full administrative proceedings as to those claims which had been presented to him, permitting judicial review.

[9]*Califano v. Sanders*, 430 U.S. 99, 107, 97 S.Ct. 980, 985, 51 L.Ed.2d 192 (1977), held that it does not.

supplied).[10] Three circuits have held that a claim that is not cognizable by the PRRB under section 1395*oo* is not precluded, because there is a strong presumption, not rebutted by the statute, that Congress would not cut off *all* relief.[11]

Other circuits have held that total preclusion of review except after a PRRB decision is *precisely* what was intended.[12] These courts have not been persuaded either that "to recover" limits the scope of preclusion or that Congress has not clearly stated an intent to preclude all review.[13] Rather,

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[10]The *Humana* plaintiffs challenged the Secretary's position that certain regulations were enexpt from the notice and comment provisions of the APA. *See also Mathews*, 424 U.S. at 329-32, 96 S.Ct. at 900-01 (collateral procedural due process claim can be raised without exhausting all administrative remedies); *Daniel Freeman Memorial Hosp. v. Schweiker*, 656 F.2d 473, 476 (9th Cir. 1981) (violation of APA rulemaking procedures); *St. Louis Univ. v. Blue Cross Hosp. Serv.*, 537 F.2d 283, 292 (8th Cir.), *cert. denied*, 429 U.S. 977, 97 S.Ct. 484, 50 L.Ed.2d 584 (1976) (no bar to procedural due process claim that "will not necessarily affect the University's entitlement to reimbursement or the amount allowed").

[11]*See National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 940-41 (D.C. Cir. 1982) (regulation requiring providers to use certain fiscal intermediaries); *Chelsa Community Hosp. v. Michigan Blue Cross Ass'n*, 630 F.2d 1131, 1134-45 (6th Cir. 1980) (review of intermediary determination of relatedness for years prior to creation of PRRB); *United States v. Aquavella*, 615 F.2d 12, 20-21 (2d Cir. 1980) (suit by United States against provider); *Whitecliff, Inc. v. United States*, 536 F.2d 347, 350-51, 210 Ct.Cl. 53, (Ct.Cl. 1976), *cert. denied*, 430 U.S. 969, 97 S.Ct. 1652, 52 L.Ed.2d 361 (1977) (*Salfi* does not apply to Medicare where, prior to enactment of § 1395oo, no review available at all).

[12]*Hadley Memorial Hosp., Inc. v. Schweiker*, 689 F.2d 905, 910-12 (10th Cir. 1982); *Rhode Island Hosp.*, 585 F.2d at 1160-61 (1st Cir.) (delay in administrative process does not justify disregard of *Salfi*); *Trinity Memorial Hosp. of Cudahy, Inc. v. Associated Hosp. Serv., Inc.*, 570 F.2d 600, 666-67 (7th Cir. 1977) (but Court of Claims has jurisdiction of constitutional claims); *St. Louis Univ.*, 537 F.2d at 288-89, 291-93 (as to statutory claims only; constitutional procedural claims not barred).

[13]The courts have, however, found some method of review of constitutional claims. Usually, this involves resort to the Court of Claims — now to the U.S. Claims Court — pursuant to 28 U.S.C. § 1491, which is not mentioned in § 405(h). *See Trinity Memorial Hosp.*, 570 F.2d at 667 (7th Cir.); *MacDonald*, 571 F.2d at 331-32 (5th Cir.); *Whitecliff*, 536 F.2d at 351 (Ct.Cl.). The rationale is usually that the result in *Salfi* was much

they have relied on the plain language of the provision to conclude:

> Even though the District Court may perceive equities in favor of hearing claims immediately, perhaps even the appearance of futility in forcing a party to pursue the statutory procedure, *the District Court is utterly without power* to entertain those claims. [Emphasis supplied.]

Pacific Coast Medical Enterprises v. Harris, 633 F.2d 123, 138 (9th Cir. 1980).[14]

This circuit is squarely in the latter camp. In *Dr. John T. MacDonald Foundation, Inc. v. Califano*, 571 F.2d 328, 331-32 (5th Cir.) (en banc), *cert. denied*, 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978) — a challenge to a regulation, and the Secretary's interpretation of it, governing method for determining cost — the court held that the rationale of *Salfi* "precludes all review of the Secretary's decisions by federal district courts brought under § 1331."[15] In *American Association of Councils of Medical Staffs of Private Hospitals, Inc. v. Califano*, 575 F.2d 1367 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1018, 59 L.Ed. 2d 72 (1979), the court further held that, with respect to a purely procedural claim (regulations governing evaluation of medical staffs) which would have no effect upon any reimbursement, the absence of an effect on reimbursement was "unimportant." "[Section] 405(h) extended to any *action* to recover on any claim." *Id.*, 575 F.2d at 1372 (emphasis in original).[16] This strict position was maintained

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influenced by the presence of a judicial review provision, § 405(g), in the Social Security Act, but that (until 1973) much review was not available under the Medicare Act.

[14]The Ninth Circuit in *Freeman* subsequently allowed jurisdiction in purely procedural cases. *See supra* note 10.

[15]*MacDonald* did not address § 1395oo(f) procedures and of course they supersede *total* preclusion.

[16]This reading contrasts with the emphasis on "to recover" in *Humana*. *See supra* text preceding note 10.

in *Bussey v. Harris*, 611 F.2d 1001 (5th Cir. 1980), in the face of a constitutional and statutory challenge to regulations denying reimbursement for services of a licensed physician's assistant. In short, the Fifth Circuit has consistently adhered to the position that no claims may be heard by the district court in any posture because section 405 (h) has removed *all* jurisdiction from the district courts.[17]

The Eleventh Circuit, of course, is bound by *MacDonald, et al. Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). In *United States v. Sanet*, 666 F.2d 1370 (11th Cir. 1982), an overpayment was determined but the provider refused to appeal to the PRRB and then withdrew from the program, so the Government was forced to sue the provider for return of overpayments. The provider argued that, since the suit was brought under 28 U.S.C. § 1345 (suits by the United States), which is not mentioned in section 405 (h), the district court had to consider his substantive defense to the initial administrative determination.[18] We reasoned that to permit the district court to decide the merits of this claim would grant a right of review to those who drop out of the program that is unavailable to those who stay in it. *Id.*, 666 F.2d at 1375.

The claims of V.N.A. are at the heart of the section 405 (h) preclusion, as it readily concedes. V.N.A. seeks redress on the basis of interpretation of regulations (it does

[17]The Fifth Circuit has avoided the constitutional due process difficulties which attend the total withdrawal of judicial review by finding that such suits can always be brought in the Court of Claims (now in the Claims Court) as a refund suit under 28 U.S.C. § 1491, as § 1491 is not mentioned by § 405 (h). *MacDonald*, 571 F.2d at 332; *American Ass'n of Councils of Medical Staffs of Private Hosps., Inc. v. Califano*, 575 F.2d 1367, 1373 (5th Cir. 1978) (concluding that surely ingenious lawyers could find a money claim on which to base a § 1491 suit in the Court of Claims); *Bussey v. Harris*, 611 F.2d 1001, 1005 (5th Cir. 1980).

[18]Sanet claimed that the sampling methods used by the Secretary to determine what services are necessary and reasonable violated his constitutional due process rights.

not challenge the validity of the regulations) and it directly seeks "realization of provider-cost reimbursement under the Medicare Act." *American Medical Colleges,* 569 F.2d at 107. Furthermore, the claims are within the PRRB's jurisdiction — V.N.A. has appealed to the PRRB — and the PRRB has not yet rendered a final decision. Nor is there any reason to believe that the Secretary has waived any administrative procedures. Considered alone, therefore, section 405 (h) would entirely preclude the district court from exercising jurisdiction over this case.

III.

V.N.A. argues, however, that it is not requesting review of a decision within the meaning of section 405 (h). Rather, it simply wants to preserve the status quo (*i.e.,* its solvency and ability to operate) *pending* the PRRB decision, at which time the district court would unquestionably have jurisdiction of the case.[19] The provider asserts that the district court has jurisdiction to issue an injunction under the All Writs Act, notwithstanding section 405 (h).

[4, 5] The All Writs Act, a feature of the judiciary since 1789,[20] provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651 (a) (1976). It is firmly established that the act encompasses the traditional power of the courts to enter a stay of enforcement of an agency decision already entered, pending review in the court issuing the injunction,

[19]The rendering of a PRRB decision affirming the intermediary's determination of relatedness is what mooted the Alabama Home Health Care appeal. *See supra* note 1.

[20]The first Judiciary Act, 1 Stat. 73, 81-82 (1789), contained language almost identical to the present provision.

"to prevent irreparable injury * * * resulting from the premature enforcement" of an agency decision. *Scripps-Howard Radio, Inc. v. Federal Communications Commission,* 316 U.S. 4, 9, 62 S.Ct. 875, 879, 86 L.Ed. 1229 (1942). In *Roche v. Evaporated Milk Association,* 319 U.S. 21, 25, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943), the Supreme Court held further that this "authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." While this power must not be used to circumvent agency decision-making, there is "a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." *Arrow Transportation Co. v. Southern Railway Co.,* 372 U.S. 658, 671 n. 22, 83 S.Ct. 984, 991 n. 22, 10 L.Ed.2d 52 (1963).

[6] Against this background, the Court in 1966 decided *Federal Trade Commission v. Dean Foods Co.,* 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966). The FTC in that case was seeking to maintain the status quo by enjoining a merger which it believed, but had not yet administratively determined, was anticompetitive. The Court, relying on *Scripps-Howard, Roche,* and *Arrow,* held that the power to enter a status quo injunction "extends to the *potential* jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *Dean Foods,* 384 U.S. at 603, 86 S.Ct. at 1742 (emphasis supplied).[21] The statutory grant of power to review FTC orders "includes the traditional power to issue injunctions to

[21] In general, the cited cases involved situations in which a court of appeals was reviewing agency action, the standard pattern for judicial review of agency action. Since under the Medicare Act the district courts have the appellate functions, *Dean Foods* and the other cases apply to them.

preserve the *status quo* while adminstrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." *Id.*, 384 U.S. at 604, 86 S.Ct. at 1743.

The FTC had argued that, if the proposed merger took place, the resultant sharing and division of assets between the companies would render impossible the fashioning of an administrative order separating the two companies.

> [T]he Court of Appeals "will, in effect, be deprived of its appellate jurisdiction [over final Commission orders] and of the opportunity to enter a meaningful final order of its own in respect to this acquisition, since the *res in custodia legis* — Bowman [the acquired company] — will have vanished."

Dean Foods, 384 U.S. at 600, 86 S.Ct. at 1740. The Court accepted this contention as true, 384 U.S. at 601, 86 S.Ct. at 1741, and relied heavily on these compelling facts. Accordingly, the Fifth Circuit has said:

> A federal court has the power under the All Writs Act to issue injunctive orders [to preserve the status quo] in a case even before the court's jurisdiction has been established. When potential jurisdiction exists, a federal court may issue status quo orders to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it. *See, e.g., FTC v. Dean Foods Co.* • • •

ITT Community Development Corp. v. Barton, 569 F.2d 1351, 1359 n. 19 (5th Cir. 1978).[22]

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[22]This rationale is consistent with the All Writs Act provision for "all writs • • • *in aid of* their respective jurisdictions." 28 U.S.C. § 1651(a) (emphasis supplied). *See also United States v New York Tel. Co.*, 434 U.S. 159, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977); *Chandler v. Judicial Council*, 398 U.S. 74, 112-13, 90 S.Ct. 1648, 1667-68, 26 L.Ed.2d 100 (1970) (Harlan, J., concurring in denial of writ). "The All Writs Act • • • provided statutory confirmation of this authority." *Sampson v. Murray*, 415 U.S. 61, 73-74, 94 S.Ct. 937, 945, 39 L.Ed.2d 166 (1974).

The direct application of *Dean Foods* to the present case might well be expressed by use, verbatim, of an earlier statement by Justice Douglas:

> The power to issue a stay is inherent in judicial power and as indicated by the Court rests on the exercise of an informed discretion on a showing of irreparable injury to the applicant or to the public interest, *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 [62 S.Ct. 875, 882, 86 L.Ed. 1229]. That doctrine is not limited, as the Department of Justice suggests, to issuance of stays by a court only after an appeal has been taken. We held in *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-604 [86 S.Ct. 1738, 1742-43, 16 L.Ed.2d 802], that the All Writs Act, 28 U.S.C. § 1651, which empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,' " extends to "potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." The District Court has at least a limited review of the [Secretary] • • •. Hence the All Writs Act justified its power to grant a stay.
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> We have, therefore, a case where a stay supplements and does not curtail administrative power, the [Secretary] having no authority to grant that relief. The District Court power preserves the status quo, does not pass on the merits of the controversy, and limits its stay to the date when the merits of the discharge are adjudicated by the [Secretary]. • • •

Sampson v. Murray, 415 U.S. 61, 93-94, 94 S.Ct. 937, 954, 39 L.Ed.2d 166 (1974) (Douglas, J., dissenting). Considered alone, therefore, the All Writs Act, under *Dean Foods*, would permit the district court to exercise jurisdiction over this case.

A.

IV.

The two lines of analysis described above — one (Part II) based on section 405 (h), the other (Part III) on the All Writs Act and *Dean Foods* — parallel the arguments in this case of the district court and the Government and of V.N.A., respectively. Considering them, one has less a sense of conflicting theories than of ships passing in the night. The Medicare Act preclusion line of argument and the *Dean Foods* line of argument do not really respond to each other, and neither refers to a common higher authority which could explain how they are related.

In *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974), the Supreme Court was faced with a similar conflict between the expansive *Dean Foods* doctrine and the "established principles [which refuse] equitable intervention in disputes over tenure of governmental employees" (415 U.S. at 71, 94 S.Ct. at 944).[23] *Murray* did not adopt the direct *Dean Foods* approach — the sharp-eyed reader will have noted that Justice Douglas' comments above were in dissent — and attempted to find the common ground between the preclusion and *Dean Foods* lines of analysis.

[7] The Court in *Murray* agreed with *Dean Foods* to the extent that *Murray* held that the district courts are "not totally without authority to grant interim injunctive relief" in a status quo action, 415 U.S. at 63, 94 S.Ct. at 940, but then said:

> While it would doubtless be intellectually neater to complete separate the question whether a District Court has authority to issue any temporary injunctive relief * * * from the question whether the relief grant-

[23] *See White v. Berry*, 171 U.S. 366, 18 S.Ct. 917, 43 L.Ed. 199 (1898).

> ed in this case was proper, we do not believe the questions may be thus bifurcated into two watertight compartments. • • •

415 U.S. at 68, 94 S.Ct. at 942. Accordingly, a district court is

> quite wrong in routinely applying to this case the traditional standards governing more orthodox "stays." [Citation and footnote omitted.] Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that respondent *at the very least must make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions in* [*such*] *cases.* [Emphasis supplied.]

Murray, 415 U.S. at 83-84, 94 S.Ct. at 950. In other words, the proper analysis adjusts the standard requirements for the requested preliminary injunction in light of (1) whether refusal to grant the injunction will defeat the court's review jurisdiction and (2) whether Congress intended to permit or to preclude a status quo injunction.

In considering the harm to the court's jurisdiction, *Murray* was at some pains to emphasize the extreme facts in *Dean Foods*. In *Dean Foods*, the disappearance of the acquired company would have "effectively defeated" the court's ability to exercise its jurisdiction. *Murray*, 415 U.S. at 77-78 & nn. 34, 36, 94 S.Ct. at 946-47 & nn. 34, 36. In *Murray* by contrast — where a probationary Government employee was seeking an injunction against dismissal pending final administrative review — the court's review was not endangered because Mrs. Murray would not cease to exist. The Court therefore found that the dismissal of a Government employee (except in rare cases, *see* 415 U.S. at 92 n. 68, 94 S.Ct. at 953 n. 68) does not give rise to the same injury to jurisdiction as threatened in *Dean Foods*.

To determine congressional intent, the Court looked at both the statutes governing the Civil Service and the cases interpreting them. It concluded that the statutory framework intended that probationary employees have relatively few substantive rights, so that interim reinstatement by the court would in effect give the employee new, unauthorized rights. Furthermore, a sufficient remedy was provided which did not include status quo injunctions. *Murray*, 415 U.S. at 81-83, 94 S.Ct. at 948-49. The Court pointed out, based on case law, that the courts had traditionally given the Government extremely wide latitude in personnel matters and that a status quo injunction would be seriously disruptive of the authorized administrative process. 415 U.S. at 83, 94 S.Ct. at 949. In essence, Congress intended that judicial involvement in the administrative process would be precluded, except in rare cases, until a final administrative decision had been rendered.

Concluding that considerations of harm to jurisdiction and congressional intent "cut against" the availability of a status quo injunction, the Court held that Murray would have to make an unusually strong showing on the factors determining issuance of a preliminary injunction.[24] 415 U.S. at 80, 83-84, 94 S.Ct. at 948, 949-50. The Court found Murray's claim of irreparable injury unconvincing. It held that the simple loss of a job is loss of income and that mere loss of income does not establish irreparable injury even under the normal standards for granting a preliminary injunction.

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[24]The Court cited *Virginia Petroleum Jobbs Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958), for these standards, as the court below had relied on it. *See Murray v. Kunzig*, 462 F.2d 871, 877-78 (D.C. 1972), *rev'd*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166. Corresponding precedents for this circuit are *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974), and *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 956 (11th Cir. 1982).

We read *Murray* to require that *all* of the standards for a preliminary injunction — probability of success on the merits, harm to other parties, the public interest, *and* irreparable injury — are subject to the heightened standards. The author of the *Murray* opinion said as much in a later decision, in which he cited *Murray* for the proposition that several factors — he mentioned particularly irreparable injury and likelihood of success on the merits — are to be considered. *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1305, 96 S.Ct. 845, 847-48, 47 L.Ed.2d 67 (1976) (Rehnquist, Circuit Justice). *Murray* dwelt on irreparable injury, we believe, because that was the essential weakness in Murray's case.

Murray, therefore, does not so much mandate new considerations as a new way of analyzing them.[25] *Dean Foods* and its predecessors had divided their analyses between the traditional power to issue the status quo injunction and the congressional preclusion, and the appropriateness of the exercise of the power in the particular case. *See, e.g., Dean Foods*, 384 U.S. at 612, 86 S.Ct. at 1746; *Roche*, 319 U.S. at 25-26, 63 S.Ct. at 941; *Scripps-Howard*, 316 U.S. at 9-10, 62 S.Ct. at 879-80. The earlier cases, however, more sharply separated the jurisdictional question (the "traditional power") from the congressional intent, and both from the preliminary injunction standards. The sharp division is easier to manage ("intellectually neater," in *Murray's* words), perhaps because it accords better with one's general notion that jurisdiction is a yes or no proposition in a given kind of case, but it is of little help where the traditional power collides with an apparent statutory preclusion.

[25] *Murray* neither overruled *Dean Foods* nor specifically limited *Dean Foods* to its facts, *see generally Murray*, 413 U.S. at 76-78, 94 S.Ct. at 946-47, but the conclusion is inescapable that *Murray* replaces the *Dean Foods* analysis. While the foregoing discussion should amply support this proposition, it is worth repeating that Justice Douglas' *Dean Foods* analysis was in dissent in *Murray*.

B.

We must now determine whether the heightened standards used in *Murray* must be applied in this case. This involves two inquiries: whether the reviewing court's eventual jurisdiction will be defeated, and whether a status quo injunction would be contrary to the statutory scheme.

[8] The provider's essential argument with relation to harm to jurisdiction is that if it is forced out of business, review will be pointless because it will not exist as a provider. We cannot accept blindly, however, the proposition that irreparable injury to the provider is irreparable injury to the court's jurisdiction. The pre-*Murray* cases suggest that significant impairment of the exercise of jurisdiction is the applicable standard. *See Dean Foods*, 384 U.S. at 604, 86 S.Ct. at 1743 ("impairment"); *ITT Community Development Corp.*, 569 F.2d at 1359 ("impede," "detrimental," "diminish"). However, *Murray* used the term "defeat" to describe the required effect on the court's jurisdiction, and it emphasized the exceptional facts of *Dean Foods* in which jurisdiction would have been utterly defeated. *Murray*, 415 U.S. at 77-78, 94 S.Ct. at 946-47. Although a corporation could very well disappear as a provider of medical services,[26] at the very least an estate in bankruptcy would remain to collect the money owing it, if any. The jurisdiction of the district court could be significantly impaired by the bankruptcy of the provider though not necessarily defeated. *Dean Foods* may be satisfied, but *Murray* may not.

Be that as it may—we recognize that the distinction between "impair" and "defeat" is a fine one—we must concurrently examine whether the granting of a status quo injunction pending an administrative determination of relatedness would be contrary to the intent of Congress in the Medicare Act.

It cannot be gainsaid that the present dispute is at the

[26] V.N.A. alleges that it will go bankrupt. The district court did not reach the issue. As to the jurisdictional inquiry we accept as true the provider's allegations. *Dean Foods*, 384 U.S. at 601, 86 S.Ct. at 1741.

core of the act's preclusion. The provider directly seeks higher reimbursement, which *MacDonald* held is most emphatically precluded—the area is where the district court is "utterly without power." *Pacific Coast*, 633 F.2d at 138. In addition, the dispute hinges on the application of regulations (conceded to be valid) to particular, complicated facts. This is precisely the situation in which PRRB review will not only be most helpful and appropriate, but also where it holds the greatest potential for eliminating the need for eventual resort to the courts.[27]

This is also the area for which Congress clearly provided a remedy which places PRRB review first. The relief in the courts at a later time was intended by Congress to be a full and complete remedy. In the words of *Murray*, the provider is "in effect asking [the] court to grant * * *, on an interim basis, relief which the administrative agency charged with review * * * could grant * * * only after it had made a determination on the merits." 415 U.S. at 74, 94 S.Ct. at 945. It is significant that Congress has specifically provided for a remedy in the district court where the PRRB cannot decide the question because it has no jurisdiction. 42 U.S.C. § 1395oo(f)(1) (added by Pub.L. No. 96-499, § 955, 94 Stat. 2647 (1980)). The addition of this provision[28] demonstrates congressional concern for timely disposition of claims. But Congress provided expedited review *only* for the PRRB jurisdiction problem. Reasoning from silence can be dangerous, but the conclusion seems inescapable that Congress intended to limit judicial review to specific situations.

Against these consideration is V.N.A's basic contention that it is not asking for review on the merits but merely a

[27] It will be recalled that *Salfi* held that jurisdiction was barred even where the Secretary would be certain not to grant relief, *e.g.*, a claim that the Secretary's regulations were unconstitutional. 422 U.S. at 762, 95 S.Ct. at 2465; *see supra* note 8. Here a negative determination is by no means certain.

[28] The addition was a response to the *Salfi* problem of having to exhaust a futile remedy. *See* H.R.Rep. No. 1167, 96th Cong., 2d Sess. 394 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 5526, 5757 (report on Omnibus Reconciliation Act of 1980).

stay to maintain the status quo. It is true that the cases speak of preclusion of review of PRRB *decisions*, and the main purpose of preclusion is to avoid anticipation by the court of an agency determination on the merits. However, the third sentence of section 405(h) precludes any "*action*"; it does not limit its scope to judicial review on the merits. *Medical Staffs*, 575 F.2d at 1372.[29] As the third sentence is the teeth of the preclusion provision (*Salfi*, 422 U.S. at 757, 95 S.Ct. at 2462), this is a fatal defect in the provider's theory.

V.N.A. also points out that the regulatory prohibition on PRRB stays is not mandated by the Medicare Act. The act gives the PRRB "full power and authority to make rules and establish procedures, not inconsistent with the provisions of this subchapter or regulations of the Secretary." 42 U.S.C. §1395oo(e). The prohibition, it argues, is therefore not part of the statutory scheme that includes preclusion.

While the regulatory arrangement certainly sows the seeds of potential injury to a provider, that potential is not *contrary* to the statutory structure. *Eldridge* suggests strongly that there is room for a wholly collateral procedural attack, for example, to compel agency action wrongfully withheld. *Eldridge*, 424 U.S. at 330-31, 96 S.Ct. at 900-01. In other words, to the extent that a provider could show that a delay during PRRB review is contrary to the statute, it might well have a cause of action.[30] Furthermore, our holding that there is fundamental jurisdiction in the case of truly wrongful agency action also mitigates any extremely ill effects of preclusion.

Finally, *Murray* held that where interim relief would usurp or expand the agency's jurisdiction it impermissibly disrupts the agency. *Murray*, 415 U.S. at 71-72, 94 S.Ct. at 943-44. The relief requested here—purely staying affirmative agency action to collect—would appear to present no such obstacle. However, we must question, as the Secretary does,

[29] *See supra* note 16 and accompanying text.

[30] It is not contended in this case that the PRRB has unlawfully delayed its decision.

the practical reality of the idea that the district court does not consider the merits in a close case like this. In order to establish substantial likelihood of success on the merits it will become necessary, as it did in *Alabama Home Health Care*, for both parties to engage in extensive discovery and to present their whole cases on the merits.[31] The district court will in effect decide the merits of the case before the board does[32]—and then conduct a limited review of the board's decision as maintained in the statute.

The preclusion provision in the Medicare Act works in both directions: it avoids unnecessary and/or uniformed court decisions, and it protects the integrity of the administrative process. The agency would be substantially undetermined by issuance of a status quo injunction. Where both parties engage in extensive discovery and presentation of their whole cases on the merits, the district court does *exactly* what the PRRB is expected to do. It is simply not realistic t osay that the district court in such a case does not address and decide the merits of the case. Such plenary consideration violates not only the procedural structure of the Medicare Act, but it is in effect a de novo decision on the merits in direct contravention of the limited review mandated by statute. 42 U.S.C. § 1395oo (f) (1) (APA standards, 5 U.S.C. § 706 (1976)). A district court's action in granting a status quo injunction after lengthy consideration of the merits must be deemed to be fundamentally at odds with the Medicare Act.

We therefore conclude that, even granting the strong possibility of harm to the reviewing court's eventual jurisdiction, the lengthy review of the merits required in a close case such as this is so at odds with the statutory framework that a conflict is created which requires, pursuant to *Murray*,

[31]The district court in *Alabama Home Health Care* considered 300 pages of testimony in addition to voluminous exhibits.

[32]We do not mean to suggest that the kind of limited review of the merits necessitated by the requirement of substantial likelihood of success on the merits is in any way illegitimate. Rather, our criticism of in-depth consideration of the merits relates solely to this particular statutory scheme.

that higher standards for a preliminary injunction be applied in this case.

V.

A.

Our ultimate task is to apply the heightened standards to the case at bar. However, while *Murray* required a higher standard for granting preliminary injunctive relief, it did not articulate the new standard.

Some guidance can be obtained from cases decided under the Anti-Injunction Act, which provides that "*no suit* for the purpose of restraining the assessment or collection of any tax *shall be maintained in any court.*" I.R.C. (26 U.S.C.) § 7421(a) (Supp. V 1981) (emphasis supplied). This language is very similar to the preclusion language of section 405(h), and it serves a similar purpose:

> to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. * * *

Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1962); *see also Bob Jones University v. Simon*, 416 U.S. 725, 736, 94 S.Ct. 2038, 2045, 40 L.Ed.2d 496 (1974). Despite the apparently absolute prohibition on such suits, the Supreme Court has held that there are exceptional cases in which jurisdiction can be exercised:

> Only upon proof of the presence of two factors could the literal terms of § 7421(a) be avoided: first, irreparable injury, the essential prerequisite for injunctive relief in any case; and second, *certainty* of success on the merits. [*William Packing*], [370 U.S.] at 6-7 [82 S.Ct. at 1128-29]. An injunction could issue only "if it is clear that under no circumstances could the Government ultimately prevail. . . ." *Id.*, at 7 [82 S.Ct. at 1129]. * * * [Emphasis supplied.]

Bob Jones University, 416 U.S. at 737, 94 S.Ct. at 2046; *Commissioner v. "Americans United" Inc.*, 416 U.S. 752, 758,

94 S.Ct. 2053, 2057, 40 L.Ed.2d 518 (1974).[33] In *Williams Packing* itself the Court had denied the injunction and its discussion of irreparable injury is particularly instructive.

> Noting that collection of the tax "would destroy its business, ruin it financiall and inflict loss for which it would have no remedy at law," the Court held that an injunction could properly issue. [Citation omitted.] The courts below seem to have found that * * * § 7421(a) does not bar suit for an injunction against the collection of taxes not due if the legal remedy is inadequate. We cannot agree.
>
> * * * [I]f Congress had desired to make the availability of the injunctive remedy against the collection of federal taxes not lawfully due depend upon the adequacy of the legal remedy, it would have said so explicitly. Its failure to do so shows that such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise. This is not to say, of course, that inadequacy of the legal remedy need not be established if § 7421(a) is inapplicable; * * *. [Citations omitted.] However, since we conclude that § 7421(a) bars any suit for an injunction in this case [because the Government may well prevail], we need not determine whether the taxpayer would suffer irreparable injury if collection were effected.

Williams Packing, 370 U.S. at 6-7, 82 S.Ct. at 1128-29. These cases are not controlling here, but they do offer a concrete example of the *Murray* synthesis.

[9] The preclusion of review in section 405(h), and its purpose to ensure that the agency make the first determination, will best be effectuated by a standard of review

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[33]The Court continued: "* * * And this determination would be made on the basis of the information available to the Government at the time of the suit. 'Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained.' * * * [*Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S.Ct. 1125, 1129, 8 L.Ed.2d 292 (1961).]" *Bob Jones Univ. v. Simon*, 416 U.S. 725, 737, 94 S.Ct. 2038, 2046, 40 L.Ed.2d 496 (1974). We do not deem it necessary to impose so strict a rule here.

which requires (1) a virtual certainty of irreparable injury, (2) a similar certainty of success on the merits, for example, outrageous or entirely unauthorized (*ultra vires*, so to speak) agency action, (3) minimal harm to the agency, in the sense of disruption of its processes, and (4) the public interest clearly favoring the assumption of jurisdiction. All of these requirements must be satisfied.

B.

[10] Finally, we apply each requirement to the undisputed facts in this case.

(1) V.N.A. makes a far stronger case for irreparable injury than was made in *Murray*. It specifically alleges an irreparable harm—being forced out of business[34]—which is not remediable in the interim by the PRRB.

The significance of this injury under the Medicare Act is lessened, however, by three considerations. First, the Secretary may enter into an agreement to make suspension of payments as painless as possible. Such an agreement will stay total suspension pending PRRB review. 42 C.F.R. § 405.373(a)(2). In this case, Blue Cross offered to negotiate such a plan, but V.N.A. did not respond, instead filing for a preliminary injunction. (A plan was entered into between Alabama Home Health Care and its intermediary.) Second, the problem of bankruptcy is endemic to a system which relies on non-profit, cash-poor providers which are wholly dependent on Medicare reimbursement. Were irreparable injury the only criteria for exercise of jurisdiction, the courts would be inundated by claims from other providers whenever they were determined by the intermediary to have been overpaid. Third, providers do not lack notice of these review provisions. Having chosen to operate within the system[35] on a cash-poor basis, they take a knowing risk that an inter-

[34] *See Williams Packing*, 370 U.S. at 6, 82 S.Ct. at 1128.

[35] This complements the probability of success standard. When the intermediary acts without authority – *outside* the system – the provider has a strong case for an injunction.

mediary's determination might delay payment.[36] In sum, there is no reason to think that the straits in which this provider finds itself "so far depart from the normal situation" (*Murray*, 415 U.S. at 92 n. 68, 94 S.Ct. at 953 n. 68) as to justify fundamental deviation from the statutory's scheme.

In view of these considerations, we cannot conclude that the provider, in the words of *Murray*, made "a showing of irreparable injury sufficient in kind and degree to override these factors [*i.e.*, the statutory preclusion] cutting against the general availability of preliminary injunctions" to providers (415 U.S. at 84, 94 S.Ct. at 950).

(2) We also find that V.N.A. cannot show a probability of success on the merits even approaching the certainty required in light of the statutory preclusion. It presented a plausible but by no means overwhelming case. The pervasive role of HCI in the creation and operation of V.N.A. offered an ample basis for the intermediary's initial determination of relatedness. Indeed, V.N.A. itself accused HCI of overcharging—precisely the problem which the related party principle was designed to cure. To show unrelatedness, V.N.A. cited other undisputed facts and argued their relative significance. The detailed inquiry and analysis that this will obviously entail does not constitute, in our view, certainty of success on the merits.[37]

From our review of the record, it is clear to us that if the intermediary was wrong in finding the organizations to be related, it was not obviously so. Certainly it did not overstep its authority in so finding.[38] The situation of disputed appli-

[36]The Secretary argues that an injunction would reward the provider whose poor business practices placed it in a near-bankruptcy position. There is no evidence that the troubles of these providers were caused by poor management, though it does seem that a prudent manager would provide for the possibility of delayed reimbursement.

[37]The district court in *Alabama Home Health Care* was compelled to rely ultimately on the credibility of witnesses to determine relatedness. This, too, would not constitute certainty.

[38]For example, an intermediary's determination that two organizations were related solely because their presidents were next-door neighbors would involve little fact-finding by the court and would be so clearly un-

cation of a regulation to complex and lengthy facts is particularly suited to initial agency interpretation of its own regulations.

(3) The factor of harm to another party in this case consists mainly in disruption of the agency, a key factor in *Murray*. 415 U.S. at 77-78, 83, 94 S.Ct. at 946-47, 949. The court's need to hold a full hearing on the merits and to determine credibility in a close case seriously disrupts the congressionally mandated process and in effect tells the PRRB how to decide. As to the factual aspect of the case, determination of credibility is the hallmark of de novo review, which is expressly denied the district court. 42 U.S.C. § 1395oo; 5 U.S.C. § 706. As to the legal aspect, the agency should have the first opportunity to interpret its own regulations in these factual applications.

There is in addition the possibility that the Government will not recover its overpayment. While the record does not directly suggest that the Government may not recover overpayments in this case, the manifest purpose of the immediate recovery position is to protect against this possibility. We should respect that administrative assessment, and issuance of an injunction would in effect overrule it.

(4) We see no independent public interest consideration that clearly favors the assumption of jurisdiction.

VI.

We conclude that it would be inappropriate for a district court to exercise its All Writs Act jurisdiction to grant a status quo injunction in this case. The district court therefore correctly denied V.N.A.'s request for an injuncton, though through a different analysis than we have found to be required. The judgment of the United States District Court for the Middle District of Georgia is

AFFIRMED.

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justified by the regulations that a situation involving serious harm might well justify the issuance of a status quo injunction.

GODBOLD, Chief Judge, dissenting:

To justify issuance of a status quo injunction under the All Writs Act pending administrative review, VNA must establish the traditional prerequisites of injunctive relief. I agree with the court that under *Sampson v. Murray* the required strength of VNA's showing depends on two factors: whether a refusal to grant the injunction will defeat the district court's merits jurisdiction and whether Congress intended to preclude or permit a ninterim injunction. I disagree with the court's evaluation of these two factors and its corresponding conclusion that VNA must make out a virtually certain case.

The court accepts VNA's allegations that it will be forced out of business and go bankrupt if interim relief is denied. Maj. op. slip op. at 4430 n. 26 at . . . . n. 26. It concludes that this may be a significant impairment of the district court's jurisdiction but does not necessarily defeat it. *Id.* slip op. at 4430 at . . . . It seems to hold that if VNA proved or alleged that it would "disappear", *id.* slip op. at 4428 at . . . , the court could issue an injunction, but if it is merely going bankrupt the court cannot issue an injunction.

This is too fine a distinction. The term "defeat" [if jurisdiction] in *Murray* must be given a common sense meaning. *Murray* emphasized that injunctive relief was needed in *Dean Foods* to prevent "the *practical* disappearance" of one of the litigants through merger and to preserve the agency's and the court's ability to implement "their statutory duties by fashioning effective relief." 415 U.S. at 77, 94 S.Ct. at 947 (emphasis added). Accordingly, the court's jurisdiction is "*effectively* defeated", 415 U.S. at 78, 94 S.Ct. at 947 (emphasis is added), when the ultimate exercise of it has little possible chance of achieving efficacious results.

In *Murray* interim relief was not necessary to preserve the possibility of efficacious relief because, as the Court noted, Congress had provided an adequate posthoc remedy. 415 U.S. at 75, 94 S.Ct. at 945. The situation here is strikingly different. A court has no power to breathe life into the corpse

of a provider that is out of business and bankrupt. The possibility that a court may order the government to pay the disputed amount to the provider's representative in bankruptcy proceedings is hardly an efficacious remedy. Absent an injunction the district court's jurisdiction will be effectively defeated within the meaning of *Dean Foods* and *Murray*.

Turning to congressional intent, arguably one can infer an intent favoring issuance of a status quo injunction. Absent an injunction, review by the administrative board as well as the court will become virtually meaningless; with VNA out of business and bankrupt, neither board nor court could grant an effective remedy. This case differs from *Murray* because Congress has not provided an adequate post-hoc remedy, making effective review and relief possible. I believe Congress intended that the review it conferred on board and courts be meaningful.

In assessing congressional intent one must bear in mind that VNA is not asking the district court to decide the merits of its claims; it seeks an interim injunction while the board decides its claims. Because the court overlooks the implications of this basic fact, it errs in inferring an intent to deny or strictly limit interi minjunctive relief from 42 U.S.C. § 405(h) and 42 U.S.C. § 1395oo(f)(1).

In pertinent part, § 405(h) provides:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought *under sections 1331 [federal question jurisdiction] or 1346 [United States as a defendant] of title 28* to recover on any claim arising under this subchapter.

42 U.S.C. § 405(h) (1976) (emphasis added) (incorporated into the Medicare Act by 42 U.S.C. § 1395ii). Section 405(h) generally operates to preclude a district court from deciding the merits of a provider's claims until the board has rendered a final decision. Except where the board lacks jurisdiction to decide issues raised by the provider, *see infra*, the district court cannot base its reveiw on § 1395oo(f)(1) because the

board has not rendered a final decision. Section 405(h) acts to preclude the court from deciding th ecase under the other possible bases of jurisdiction, §§ 1331 and 1346.

VNA does not seek judicial review on the merits of its claims. Section 405(h) is simply inapplicable because this is not an action brought under § 1331 or § 1346, but rather an action brought under the All Writs Act, 28 U.S.C. § 1651(a), in aid of the court's potential jurisdiction under 42 U.S.C. 1395oo(f)(1).[1] The court's position that § 405(h) does apply thus cannot be supported. Additionally, the court's position conflicts with its holding that interim injunctive relief is available in some cases. If § 405(h) were applicable, it would, by its plain terms, preclude such relief in all cases.

Of course, the lesson of *Murray* is that the All Writs Act should be interpreted in light of policies militating against issuance of interim injunctive relief. But § 405(h) reflects no such countervailing policies. As the court notes, "the main purpose of [§ 405(h)] preclusion is to avoid anticipation by the court of an agency determination on the merits." Maj. op. slip op. at 4431 at ——. VNA does not seek a determination on the merits of its claims.

The court's reliance on § 1395oo(f)(1) is similarly misplaced. Section 1395oo(f)(1) generally precludes district court review until the board issues a final decision. That section, however, contains an exception allowing direct judicial review in any action involving an issue that the board lacks jurisdiction to decide. The court reasons that the negative implication of this exception is that Congress intended to preclude injunctive relief while administrative proceedings are pending. But § 1395oo(f)(1) addresses the timing of the district court's review of the merits of a pro-

[1]The All Writs Act is not an independent source of jurisdiction. Rather, it empowers the court to issue injunctive orders to preserve potential jurisdiction founded in other provisions. *See FTC v. Dean Foods*, 384 U.S. 597, 603, 86 S.Ct. 1738, 1742, 16 L.Ed.2 802 (1966); *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 n. 19 (5th Cir. 1978).

vider's claims, a type of review not involved here. VNA does not seek to circumvent an administrative decision on the merits of its claims; it desires injunctive relief to preserve the possibility of meaningful administrative merits review and relief. I cannot infer from § 1395oo(f)(1) an intent to deny interim injunctive relief. Congress's failure to include an explicit provision authorizing interim injunctive relief in the Medicare Act can be explained on other grounds. Congress might reasonably have concluded that the All Writs Act made such a provision unnecessary. Or Congress possibly did not consider the issue. In any case § 1395oo(f)(1) lends no support to, and, in fact, cuts against, the court's position. Because the board would otherwise be powerless to issue effective relief, interin injunctive relief promotes rather than hinders the administrative review contemplated by §1395oo-(f)(1).

Finally, I do not agree with the conclusion that the district court, in deciding whether to grant a status quo injunction, interferes with the administrative board's review. The court reasons that the district court's determination regarding the plaintiff's probable success on the merits usurps the board's statutory prerogative to decide the merits in the first instance. Although the court's determination is not binding on the board, the court states: "It is simply not realistic to say that the district court . . . does not address and decide the merits of the case." Maj. op. slip. op. at 4431 at ——. This reasoning sweeps too broadly. The district court must consider the plaintiff's likelihood of success in every case where interim injunctive relief is sought. The court's opinion implies that in all such cases the court should be reluctant to even entertain the possibility of injunctive relief because its advance assessment of plaintiff's probability of success will effectively predetermine the ultimate decision of the administrative body before whom review is pending. This reasoning suggests that this court, in considering a motion for an injunction pending appeal, should hesitate to assess the plaintiff's likelihood of success because its assessment might taint

the decision of the panel to whom the appeal is ultimately assigned. This cannot be correct.

The concern about the effect of the district court's probable success determination on the administrative board's decision was also present in *Murray*, as it is in all cases where interim injunctive relie fi ssought. Yet the court did not mention this concern, despite discussing whether interim injunctive relief would interfere with the administrative process.

Ironically, the court's "virtual certainty" standard exacerbates the very evil the court seeks to exorcise. A determination that the plaintiff is virtually certain to prevail on the merits necessitates an even firmer conclusion on the merits and is even more likely to straitjacket the administrative board.

To summarize, Congress did not intend to preclude or limit interim injunctive relief. In fact, a status quo injunction aids rather than interferes with the board's review. Absent injunctive relief, the board's merits review will lack meaning because the board is entirely unable to provide an effective remedy. Congress intended that the board's review have meaning and efficacy.

Because without an injunction the district court's jurisdiction will be effectively defeated within the meaning of *Murray*, and the evidence of congressional intent does not militate against the issuance of injunctive relief, I would not require that VNA make out a virtually certain case. I would remand to the district court to determine whether VNA can make out a case under the usual test for injunctive relief.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8407

V.N.A. OF GREATER TIFT COUNTY, INC.,
a Georgia non-profit corporation,
Plaintiff-Appellant,

v.

RICHARD S. SCHWEIKER, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

(Opinion August 12, 11 Cir., 1983, —— F.2d ——).
(October 7, 1983)

Before GODBOLD, Chief Judge, FAY and SMITH*, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be pooled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh

*Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

V.N.A. OF GREATER TIFT COUNTY, INC., a Georgia non-profit corporation, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 82-106-COL
RICHARD S. SCHWEIKER, et al., Defendants.	)	

ORDER

The foregoing matter came before the Court on a complaint filed by V.N.A. of Greater Tift County, Inc. seeking a preliminary injunction to restrain the Secretary of Health and Human Services and Blue Cross and Blue Shield of Georgia/Columbus, Inc. from withholding, suspending or reducing future Medicare payments and from any other collection action which in any way attempted to recoup an alleged overpayment for fiscal year 1980. Plaintiff contends that a preliminary injunction should issue to maintain the status quo while it pursues its administrative remedies before the Provider Reimbursement Review Board (PRRB). Plaintiff, as a home health agency, provides home health services within the meaning of Section 1861(o) of the Social Security Act, 42 U.S.C. § 1395(x). The Secretary has assessed a Medicare overpayment against plaintiff in the amount of $31,637.00 for fiscal year ending July 31, 1980.

Defendants have filed a motion to dismiss in response to plaintiff's request for a preliminary injunction. Defendants strongly argue in their motion that this court lacks jurisdiction over the subject matter of the complaint because plaintiff has failed to exhaust its administrative remedies required prior to judicial review.

A hearing was held in this matter on June 24, 1982. Various witnesses testified on behalf of the parties and certain documents were introduced into evidence relating to the calculation of the alleged Medicare overpayment. After full consideration of the evidence and the arguments made by counsel, the court is of the opinion that it lacks jurisdiction over the subject matter of this complaint. 42 U.S.C. § 1395oo(f) provides the federal district courts with jurisdiction to review reasonable cost determinations made by the Provider Reimbursement Review Board when the amount in controversy is $10,000.00 or more. In this case, the plaintiffs do not yet have a determination from the PRRB for the court to review. Plaintiff has, therefore, failed to exhaust its administrative remedies. Until there has been a hearing before the PRRB, there is no jurisdiction in the district court to either review the case on its merits or consider entering preliminary injunctive relief. *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457 (1975).

Furthermore, plaintiff's argument that procedural due process necessitates a hearing prior to any recoupment of an overpayment is without merit. See *Mathews v. Eldridge*, 424 U.S. 319, 96 Sup.Ct. 893 (1976).

Based on the foregoing reasons, the plaintiffs' motion for a preliminary injunction should be and is hereby DENIED. Furthermore, because this court lacks subject matter jurisdiction, defendants' motion to dismiss shoul dbe and is hereby GRANTED.

SO ORDERED, this 28 day of June, 1982.

/s/ J. Robert Elliott

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE